

1 UNITED STATES BANKRUPTCY COURT

2 EASTERN DISTRICT OF NEW YORK

3 Case No. 23-43027-nhl

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5 In the Matter of:

6

7 COTTONWOOD VENDING,

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9 Debtor.

10 - - - - - x

11 United States Bankruptcy Court

12 271-C Cadman Plaza East

13 Brooklyn, NY 11201

14

15 November 16, 2023

16 10:29 AM

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21 B E F O R E :

22 HON NANCY HERSHEY LORD

23 U.S. BANKRUPTCY JUDGE

24

25 ECRO: UNKNOWN

1 HEARING re [25] Application to Employ Application to Employ  
2 A.Y. Strauss as Counsel to the Debtor and Debtor in  
3 Possession Filed by Eric H Horn on behalf of Cottonwood  
4 Vending LLC.

5  
6 HEARING re [14] Initial Case Management Conference

7  
8 HEARING re [31] Jason Penners Joinder to Motion to Dismiss  
9 by Adam Sherman (ECF Doc. No. 30). Filed by Sheryl P  
10 Giugliano on behalf of Jason Penner (RE: related  
11 document(s) [30] Motion to Dismiss Case filed by Creditor  
12 Adam Sherman).

13  
14 HEARING re [30] Motion to Dismiss Case Filed by Jennifer Amy  
15 Rossan on behalf of Adam Sherman.

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25 Transcribed by: Rita Weltsch

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15  
16 ALSO PRESENT:  
17 ANIELLO ZAMPELLA  
18 JASON PENNER

19  
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23  
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1 P R O C E E D I N G S

2 THE COURT: I'm all for other attorneys  
3 presenting, so that's fine. Who else is appearing today?

4 MS. ROSSAN: Good morning, Your Honor. This is  
5 Jennifer Rossan for creditor, Adam Sherman.

6 THE COURT: Okay, just go fully. I want to get  
7 everyone down here for my notes for Adam Sherman. Okay, go  
8 ahead.

9 MS. GIUGLIANO: Good morning, Your Honor. Sheryl  
10 Giugliano, Ruskin Moscou Faltischek, counsel to creditor,  
11 Jason Penner. Also here with me is Mr. Penner attending by  
12 Zoom and our co-counsel, Brad Nash at Hoguet Newman Regal &  
13 Kenney, again on listen, but state court litigation counsel.  
14 Thank you.

15 THE COURT: Thank you.

16 MR. BANZHAF: Good morning, Your Honor. Alex  
17 Banzhaf from Tuttle Yick for creditor, Robert Taylor.

18 THE COURT: Okay. So I heard your sound, but  
19 your lips weren't moving. Now, I think they're moving. Let  
20 me see, say something again. Okay, now you're moving, okay.

21 MR. BANZHAF: Sorry for any (sound glitch).

22 THE COURT: Give me the name of your client.

23 MR. BANZHAF: Robert Taylor, Entry 37.

24 THE COURT: Robert Taylor?

25 MR. BANZHAF: Correct.

1 THE COURT: All right. We don't have the best  
2 connection. What I'm going to do is I'm going to ask people  
3 (sound glitch). Okay. I'm going to ask people who aren't  
4 speaking to mute, so we don't have a problem.

5 Who else is appearing today that I haven't gotten?

6 MR. KHODOROVSKY: Good morning, Your Honor. May  
7 it please the Court, Nazar Khodorovsky, trial attorney for  
8 the U.S. Trustee, appearing in opposition to the retention  
9 of the A.Y. Strauss firm.

10 THE COURT: Okay. All right, so I did a lot of  
11 reading because I didn't have the case before today before  
12 me -- this is the first time. I have an initial case  
13 management conference. Let's do that first briefly.

14 The case was filed August 24th, so it's quite a  
15 while ago now. The matrix and the schedules were not filed;  
16 they were filed on September 8th. Everything is complete on  
17 the petition and schedules, except the NICS code.

18 With respect to retention, the retention motion by  
19 a motion returnable today and it is objected to. With  
20 respect to the bar date order, it is issued on November 5th,  
21 setting a bar date for governmental -- putting a bar date of  
22 January 8th, 2024 for general creditors and a governmental  
23 bar date of February 20th, 2024. Debtor needed to serve it  
24 by November 14th and has to file an affidavit of service and  
25 having done so. The 341 meeting was scheduled for September

1 29th. I'll get to that in a minute.

2 The Debtor, with respect to his insurance in a VIP  
3 account, I don't know the answer to the VIP account or if  
4 the U.S. Trustee, but Debtor filed a letter on 10/10,  
5 stating it has no assets that aren't insurable; we'll get  
6 back to that. We have a monthly operating report for the  
7 sub-period of August into September filed.

8 We have a lot -- we have 10 motions today to  
9 dismiss by a creditor that's been joined by other creditors,  
10 and we've got, again, this contested. The nature of the  
11 business, I got a little frightened when I saw Bitcoin  
12 because I figured, oh, I'm going to have to learn this  
13 stuff. But ATMs, unfortunately, I know very well, Bitcoins,  
14 a little less. Okay. But it's more about ATM Bitcoin  
15 kiosks than it is about Bitcoin.

16 MR. HORN: Yes, Your Honor.

17 THE COURT: Okay. So as I understand it, there  
18 were these kiosks that this Debtor owned or licensed or set  
19 up or however, but I think owned but you'll probably  
20 (indiscernible), and that if a person wanted to get money,  
21 it could -- again, it could transfer Bitcoin, I guess, to  
22 its account and get dollars. And the other was true too,  
23 the person could use dollars to get Bitcoin. The customer  
24 would deposit cash and receive an equivalent amount of  
25 Bitcoin and that would be deposited either in the customer's

1 existing Bitcoin wallet or a newly created paper wallet with  
2 private keys to access the customer's Bitcoin on the Bitcoin  
3 network.

4 To earn gross revenues -- I was a little confused  
5 by this sentence, but to earn gross revenues, the Debtor  
6 relied on the differences in Bitcoin exchange rates on its  
7 transactions to its customers and online cryptocurrency  
8 exchanges. Okay.

9 So the Debtor's operations were started by the  
10 Debtor's sole member -- this is an LLC -- Aniello Zampella,  
11 and there's some loan obligations there, again, part of the  
12 subject of the discussions with respect to the objection.  
13 Again, the reason for the filing, again, some dispute all  
14 around, but there was -- it's not disputed that there was a  
15 hack, a security breach hack in 2021, and part of the  
16 Debtor's cloud service provider, Digital Ocean. And so,  
17 therefore, there was a breach of security with respect to  
18 the Debtor's customers.

19 The Debtor shut down the ATMs. Again, there seems  
20 to be differences of opinion or maybe some inconsistencies  
21 of different times with why that happened. After the  
22 breach, again, there was some issues with respect to  
23 withdrawing money, which again, has been disclosed by the  
24 Debtor.

25 And then there's all this litigation. So there's



1 four pending litigations at least that I know about or at  
2 least that the Debtor disclosed. We've got Secure Card  
3 Management, LLC against Cottonwood Vending, LLC and others;  
4 Adam Sherman v. Aniello Zampella, et al, again, against  
5 others; Rober Taylor v. Aniello Zampella and others; and  
6 Jason Penner against Aniello Zampella and others.

7 And one of them or more of them -- one of them was  
8 removed, correct?

9 MR. HORN: Your Honor, this is Eric Horn, if I  
10 could answer. I'm also happy to give Your Honor a full  
11 backstory, a full backdrop of the case.

12 THE COURT: I read it.

13 MR. HORN: Okay, got you.

14 THE COURT: Just answer my question. Was it one  
15 action removed?

16 MR. HORN: There are two that were removed and  
17 there are two that are in the process of being removed, Your  
18 Honor.

19 THE COURT: Okay. But so far, only one of them  
20 was referred down?

21 MR. HORN: One of them, right. So one of them was  
22 to the Eastern District and referred down to Your Honor's  
23 court. One is somewhat stuck in limbo in the Southern  
24 District, which we're trying to get removed to the Eastern  
25 District. You know, they're not requiring a change of venue

1 motion. It's just that we're trying to straighten it out  
2 with the clerk.

3 THE COURT: I was going to ask you (indiscernible)  
4 a change of venue motion, okay.

5 MR. HORN: And we haven't done that for either one  
6 and the clerk automatically transferred it.

7 THE COURT: Okay, so that's two. And there are  
8 two that you haven't transferred.

9 MR. HORN: That's right, there are two more. And  
10 again, we're still within our timeframe within the 90 days  
11 of the petition date to remove those, and those will be  
12 removed in very short order.

13 THE COURT: Okay, all right. And what is your  
14 thinking behind removing them to my court?

15 MR. HORN: Well, the thinking is, Your Honor,  
16 again, there's a lot of litigation and it's all over the  
17 place, okay? We want to have the litigation addressed in  
18 one forum. Again, we don't want anyone racing to the  
19 courts.

20 THE COURT: But why my forum?

21 MR. HORN: Because it's all bankruptcy related,  
22 Your Honor. First of all, the claims belong to the estate.  
23 They were filed on behalf of the Debtor, filed on behalf of  
24 Cottonwood if you look at the captions. They're also filed  
25 individually, but they're also filed on behalf of

1 Cottonwood. So they're derivative in nature and those  
2 derivative claims belong to the estate; they are, in fact,  
3 core claims. That's why --

4 THE COURT: Okay, that's your theory. It seemed  
5 to me that -- a couple of things. We're just on this issue  
6 without getting into the bigger issues.

7 It seemed to me that, first of all, that if you  
8 hadn't removed the entire case or you don't seek to remove  
9 the entire case, there is no stay against the individual,  
10 okay. They would have been -- if they needed to be severed  
11 in state court, they would have been severed and everyone  
12 could have proceeded against the individual and any other  
13 non-debtor, so I wanted to make that observation.

14 And obviously, any time they're being removed,  
15 everyone -- you know, just so we're clear, any one party  
16 who's involved in the litigation has the right to seek  
17 remand or to ask them to abstain, so that hasn't -- that  
18 could be ahead of us, so I only wanted to make that  
19 observation.

20 And the reason I asked you this question is that  
21 at least the creditors think, from what I gather, that the  
22 Debtor was named because the Debtor was a necessary party,  
23 basically the Debtor doesn't have anything or may not have  
24 much. Maybe it has some stuff, we don't know; that's  
25 another issue. And so, either named as a necessary party or

1 even if somebody, again, was suing the Debtor. But that was  
2 not -- that was kind of tangential, either because there's  
3 not much to recover or with tangential to the party who they  
4 think is liable to them, so that's why I asked the question.

5 MR. HORN: And, Your Honor, if I could just  
6 clarify one thing, and I apologize. Again, we do disagree  
7 with the whole tangential, I guess, notation. And the  
8 reason for that, Your Honor, is because it's derivative,  
9 whether the Debtor has claims or has assets or not, and  
10 again, we do believe that they have valuable assets. But  
11 because they're asserted on behalf of the estate, that means  
12 that anything that they claim -- let's say they are  
13 successful in their litigation, anything that they recover  
14 would have to be given back to the estate because they are  
15 derivative in nature, okay, so they belong to the estate.

16 So that's why I just want to make clear that  
17 regardless of what the asset classes are or the salability  
18 of them or the values of them, that's immaterial because  
19 anything that's recovered, again, gets technically -- and  
20 that's one of the reasons we're in bankruptcy Court is to  
21 avoid, you know, it going to one party above the next,  
22 depending on who gets a judgment first, if that's where it  
23 goes. We're just trying to make sure that everyone shares  
24 pari passu in appropriate classification.

25 I can get into certain things about

1       classifications in a moment because we made progress, you  
2       know, and Mr. Langberg exercising his fiduciary duty, we've  
3       made progress on having certain things be classified by  
4       insiders. We want to advise the Court of that.

5               And we also want to advise the Court that we are  
6       in the process of wrapping up a \$250,000 DIP from a third  
7       party, which will fund this Chapter 11, and I think --

8               THE COURT: Let's not get ahead of ourselves.

9               MR. HORN: Understood, Your Honor. I just wanted  
10       to kind of paint a picture here.

11              THE COURT: Okay. Mr. Khodorovsky, on status, do  
12       we have proof of a DIP account? I know we have an insurance  
13       issue.

14              MR. KHODOROVSKY: Your Honor, Nazar Khodorovsky  
15       for the U.S. Trustee. Actually, the U.S. Trustee does agree  
16       with the Debtor that the Debtor does not have insurable  
17       assets at this time, so we have not been requiring  
18       insurance.

19              However, Your Honor, to date, we have not received  
20       proof of a debtor-in-possession account in this case.

21              MR. HORN: We have a DIP account.

22              MR. KHODOROVSKY: Your Honor, may I? Your Honor,  
23       this is Nazar Khodorovsky for the U.S. Trustee. I have not  
24       received such proof, Your Honor, I haven't seen it. I'm  
25       going to review my office's file right now to see if we have

1 it. Your Honor, there was not --

2 MR. HORN: If it wasn't sent, it was a mistake of  
3 our firm.

4 THE COURT: Mr. Horn --

5 MR. KHODOROVSKY: Your Honor, as of the 15th of  
6 November, which is the last time I updated our record, we  
7 did not have proof of a debtor-in-possession account as of  
8 the 15th of November. Also, Your Honor, the operating  
9 reports were filed, including the September report, don't  
10 have any bank statements attached.

11 Thank you, Your Honor.

12 THE COURT: Okay. Just to be clear, two things  
13 can be true at the same time. You could have a DIP account  
14 and he doesn't have proof of it.

15 MR. HORN: That's what I'm saying, Your Honor.

16 THE COURT: Those are not two -- okay, but you  
17 know what? Unless he has proof of it, he hasn't.

18 MR. HORN: Understood. We will send it out  
19 immediately after the hearing, Your Honor.

20 THE COURT: Okay.

21 MR. KHODOROVSKY: Thank you, Your Honor.

22 THE COURT: So it seems to me before we deal with  
23 the contested motion on retention, it makes the most sense  
24 for me to go to the motion to dismiss. And again, I've read  
25 the papers, (indiscernible) read every exhibit. I've read

1 the case.

2 So the initial motion or the fee motion was made  
3 by Adam Sherman, and it was joined by creditors, Jason  
4 Penner and Gregory Tuttle. So who's taking the lead today  
5 on the motion to dismiss?

6 MS. ROSSAN: This is Jennifer Rossan for creditor,  
7 Adam Sherman. It was -- we made the initial motion to  
8 dismiss that some of the other creditors joined, so I'll  
9 speak briefly for us. I know Your Honor has reviewed the  
10 papers.

11 But we think that this Chapter 11 should be  
12 dismissed because, first of all, in terms of timing, it was  
13 filed the night before creditor, Adam Sherman, was supposed  
14 to file his notice issue in the state court litigation. I  
15 know it's not dispositive, but --

16 THE COURT: Let's start with a stronger argument.  
17 Go ahead.

18 MS. ROSSAN: Okay.

19 THE COURT: Everything in my court is filed on the  
20 night before something, actually the night before a note of  
21 issue is not as significant as a lot of other kinds of time  
22 things that stop everything, so go on.

23 MS. ROSSAN: Okay, I'll move on. The Debtor has  
24 not operated since 2021 when its principal, Mr. Zampella,  
25 shut it down. He likes to tell a story now that it was

1 because of a hack in one of his service providers, but  
2 that's not the true story. Under oath in the state court  
3 action, he testified, as I'm sure you saw in our papers,  
4 that he closed down the Debtor in October 2021 because he  
5 didn't feel like operating it anymore. He didn't want to be  
6 bothered, it was a pain, and he just didn't want to deal  
7 with that business.

8 THE COURT: He also said other businesslike  
9 things, like the fact that, you know, there were certain  
10 things that he thought he would be able to get up and  
11 running, he didn't feel he had the support, difficulties  
12 with dealing with these employees. I mean, it was more than  
13 just I don't feel like doing it anymore, although I think  
14 there were those sentiments too.

15 MS. ROSSAN: I mean, I think he led when I was  
16 asking him in his deposition, he certainly -- his lead off  
17 response to my question about why he just closed the company  
18 with no regard to the employees or anyone else, customer,  
19 was he just didn't feel like doing anymore. He didn't want  
20 to be bothered, it was annoying, it was a pain in the neck.

21 And so, that's what he did; he just abandoned the  
22 entire company. He had these Bitcoin ATMs and they were  
23 placed in bodega-type places, pursuant to leases, and he  
24 just left them there in October 2021. I believe he  
25 testified in the 341 meeting that he paid for those leases



1 through December 2021, but after that, which was now two  
2 years ago, he just left them where they were and he -- who  
3 knows if they're even still there; he certainly doesn't  
4 know.

5 I mean, it's kind of -- his papers are hard to  
6 decipher because initially when you first read his initial  
7 filings, you get the feeling that he's trying to get these  
8 ATMs back and, you know, they are property that are of some  
9 value to the company. But in truth, he has no idea where  
10 they are, he hasn't seen them in two years, he doesn't even  
11 know if they're still intact, and they can't be considered  
12 any kind of asset for the estate.

13 And, in fact, to that end, the Debtor filed a  
14 final tax return in 2021, which he now claims was a mistake,  
15 but he did file. He had accountants who filed the final tax  
16 returns and wrote off all of those ATMs, okay?

17 THE COURT: So is it your understanding that he  
18 owns this ATM machine, he actually owns it outright, but in  
19 order to put it in -- and I could ask the Debtor after -- in  
20 order to put it in a bodega or a store or whatever it may be  
21 or a casino -- I don't know if they're in casinos -- in  
22 order to put it in such a place, he has a license or a lease  
23 agreement with the brick-and-mortar entity it's sitting in?

24 MS. ROSSAN: Yes, that is exactly my  
25 understanding. At one point, the Debtor did own these

1 actual ATMs, and in order to place them where they were  
2 placed around the city, he had to pay, like, a lease, a fee  
3 to have them positioned in the bodegas; that is my  
4 understanding.

5 THE COURT: Presumably, if he just walked away and  
6 left them there and stopped paying for them, maybe they  
7 would have had the right to go take them out and do  
8 something with them, so we don't know, okay.

9 MS. ROSSAN: We don't even know. Maybe they did  
10 take them out, maybe they gave them to somebody, maybe they  
11 put them out with the trash -- we have no idea -- or maybe  
12 they're still sitting there, but you would think the Debtor  
13 would know, but I don't think the Debtor knows or the Debtor  
14 hasn't indicated that he knows.

15 Then, you know, in support of this Chapter 11, he  
16 also said he's got this other asset potentially, which is a  
17 Bitcoin license, a BitLicense, which was the license  
18 required by the New York State Department of Financial  
19 Services, to run the kind of business that he was running.  
20 And that, he admits, is delinquent, it's lapsed. He, I  
21 don't think has done, despite the fact that we are  
22 obviously, you know, fiercely contesting this Chapter 11, I  
23 don't know -- the last I heard, there hasn't been anything  
24 done to revive its status or to restore its status, and I  
25 don't think they know how long that would take, whether it

1       could even be done, which brings me to the next point, which  
2       is --

3               THE COURT: Well, let me ask you another question  
4       since I used to do some work in the State of New York now  
5       and then for about 12 years.

6               MS. ROSSAN: So did I. I did too.

7               THE COURT: Oh, okay.

8               MS. ROSSAN: I worked in the Litigation Bureau.

9               THE COURT: You did, in New York City?

10              MS. ROSSAN: Yes, in New York State. I worked in  
11       litigation firm in the State A.G.'s office from '96 to '99  
12       when I went to court counsel.

13              THE COURT: Oh, okay, we overlap. So the question  
14       I would have is assuming it was revivable, is it  
15       transferrable? Lots of things are not transferrable like  
16       this in the State of New York. We would, as the bankruptcy  
17       person for the state, I would run in with my objection about  
18       things that in the view of the State were not assignable or  
19       transferrable that debtors often thought otherwise, but did  
20       not ever have a BitLicense as a subject when I was there  
21       many years ago.

22              But I don't know -- I guess you (indiscernible).  
23       I don't know if they're transferrable or assignable; it's  
24       certainly a question.

25              MS. ROSSAN: Well, that was also part of -- in our

1 motion, that was another argument that we made. We don't  
2 know either. We've never been told. We've asked this  
3 question constantly and we've never been told that it is.  
4 Maybe Mr. Horn will address it when I'm done making my  
5 entire argument; maybe he knows now.

6 But up until today, we've never been told that, in  
7 fact, it is transferrable. We've never seen any regulation  
8 from DFS saying that it is transferrable. Certainly, we  
9 won't deny that there was quite a process for the Debtor to  
10 get the -- in other words, it was very -- they were very  
11 highly vetted and they had to go through, you know, a lot of  
12 procedures in order to get the actual BitLicense; there  
13 weren't that many granted.

14 And I don't really think -- I'd be surprised, but  
15 Mr. Horn will tell us, I suppose, that you can just -- you  
16 know, that the BitLicense which arguably was issued to the  
17 Debtor can just be transferred to someone else without that  
18 person having passed all of the tests and everything that  
19 the Debtor had to initially pass in order to -- I mean, to  
20 get the BitLicense. I know this from the state litigation.  
21 They were represented by counsel, Latham & Watkins. It was  
22 a highly negotiated, you know, process; it was very in-depth  
23 and it was very time consuming. So I'll just leave that at  
24 that, but there's been no evidence. There's been no showing  
25 that it can be transferred, sold, marketed in any way.

1           And then finally, that brings us to the last so-  
2       called purported assets that the Debtor claims to have,  
3       which is a lawsuit -- or a potential lawsuit, I should say  
4       -- against the service provider, Digital Ocean, which it  
5       claims was hacked and, therefore, impacted the -- or it had  
6       some kind of impact on the Debtor's decision to just close  
7       its business; that's the argument it's making now.

8           But first of all, it's not -- we've never seen any  
9       evidence that Digital Ocean was hacked or that as a result  
10      of the hack, the Debtor lost any of its Bitcoin. I mean,  
11      this is what the Debtor says, but they've never provided any  
12      evidence that it actually happened.

13          And regardless, that hack allegedly happened in  
14      October 2021. Here we are, more than two years later, and  
15      without a lawsuit filed against Digital Ocean. I mean, I  
16      understand if it's a contract case, you know, in New York  
17      law, it's maybe a six-year statute of limitations, but in  
18      light of everything that's going on, why is the Debtor  
19      waiting? I mean, I don't know why the Debtor is waiting. I  
20      don't know why the Debtor hasn't filed a case, and it's  
21      entirely speculative that even if they file a case that the  
22      Debtor will win.

23          And one more thing on that. The Debtor's  
24      principal testified in his deposition in the state court  
25      action that none of Cottonwood, none of the Debtor's

1 security procedures were effective. He just says, well, you  
2 know, they got hacked and I just closed down the company,  
3 you know, I just didn't want to be bothered and that hack  
4 was just the last straw. But he did testify affirmatively  
5 that the Debtor was not compromised in any way; that none of  
6 the Debtor's customers' information was hacked or lost or  
7 none of the customers' Bitcoin was lost.

8 So I think this purported hack is just a  
9 convenient excuse, and now a highly speculative lawsuit,  
10 which hasn't been filed in two years, is just a last gasp by  
11 the Debtor to try to conjure up some assets to justify this  
12 Chapter 11.

13 And just with respect to some other aspects of  
14 this whole thing. Although every once in a while, the  
15 Debtor will file something that says it has an employee --  
16 that would be Mr. Langberg, who was hired specifically for  
17 this Chapter 11. In most of its filing, it admits that it  
18 did not have any employees. And there's conflicting  
19 information about, you know, whether or not the ATMs are  
20 assets or not assets.

21 It's just no reasonable likelihood that this  
22 Debtor ever intended to reorganize and there's no reasonable  
23 probability that it will emerge from bankruptcy. And this  
24 case was filed in bad faith because creditor, Adam Sherman,  
25 was about to file his note of issue in the state court

1 action and either move for summary judgment or go right to  
2 trial before a state court judge who was not buying anything  
3 this Debtor or its principal was selling.

4 And with respect -- I annexed some of the state  
5 court -- just to give the Court context, I know it's not  
6 dispositive -- I annexed some of the state court decisions.  
7 And the state court judge felt very strongly that despite  
8 the Debtor's principal testifying that, oh, I loaned all the  
9 Bitcoin to Cottonwood so I could take it out whenever I  
10 wanted because it was repayment of the loan I initially made  
11 to it, the state court judge rejected that. He looked at  
12 that 2017 promissory note, he thought it was a joke, and he  
13 basically said you cannot prove you ever made a loan of any  
14 Bitcoin to the Debtor, Cottonwood. And anything you,  
15 principal Zampella, take out, is considered property of  
16 Cottonwood.

17 So all of this kind of backstory about the  
18 principal Zampella making some kind of loan to get the  
19 Debtor started and now being able to be paid back, it's just  
20 -- it was rejected outright by the state court because  
21 there's no evidence that ever happened. So that's the basic  
22 -- that was the basic overview of Mr. Sherman's motion.

23 As the Court knows, our motion -- Sherman's motion  
24 -- was joined by another creditor, Jason Penner, and I'll  
25 turn it over now to Miss Giugliano, as long as it's okay

1 with the Court, because Miss Giugliano raised some other  
2 issues that are important to all of the motions to dismiss.

3 THE COURT: Okay. Go ahead, Miss Giugliano.

4 MS. GIUGLIANO: Sheryl Giugliano, counsel for  
5 Jason Penner. Thank you, Your Honor.

6 I don't want to take over or hijack the Court's  
7 agenda. If there somewhere else you wanted to go, I can  
8 wait or I can...

9 THE COURT: No, no. I wanted to go to you, go  
10 ahead.

11 MS. GIUGLIANO: Oh, I appreciate that. Thank you.  
12 I think Adam Sherman's counsel made good, valid points.  
13 There's a reason we filed the joinder to the motion to  
14 dismiss; the arguments are compelling.

15 I think rather than repeating any of them, the  
16 perspective we would come at it is a little bit different,  
17 maybe a slightly different nuance as to say there is nothing  
18 to administer here. It's not only that the Debtor has no  
19 reasonable hope of a likely rehabilitation or even a valid  
20 liquidation, there's nothing to do here.

21 And the only litigation claim that Mr. Horn has  
22 referred to, Debtor's counsel, because they now belong to  
23 the estate, exist because Debtor chose to file bankruptcy.  
24 But those are all valid litigation claims that could proceed  
25 in state court; you don't have to be in bankruptcy court.



1 We're here because the Debtor chose to be here for some, you  
2 know, litigation tactic presumably, a delay tactic it seems  
3 like. But, you know, the derivative action, yes, they are  
4 property of the estate because the Debtor filed; that estate  
5 didn't exist before the Debtor filed. So I think it's a  
6 little circular to make that argument and a little bit  
7 misleading to the Court.

8 The next point I would make, Your Honor, is just  
9 that the Debtor's counsel is referring to this \$250,000 DIP  
10 loan with no motion filed, no discussion with anybody about  
11 the terms or a term sheet sent around to the parties, which  
12 presumably is going to be used really for two reasons: to  
13 potentially cure an issue, our objection, to the U.S.  
14 Trustee's objection to the Debtor's retention application;  
15 and then separately, second, to repay the Debtor's principal  
16 on an alleged secured loan that was perfected and  
17 potentially given on the day of the filing.

18 So it's unclear, from our perspective at least,  
19 why there is a need for a DIP loan in this case, other than  
20 to pay attorneys' fees, pay Mr. Langberg, and to repay the  
21 Debtor's principal.

22 Last, I would say even if the Debtor wanted to  
23 come forward and say, no, we have three potential assets  
24 here -- the BitLicense, the ATM kiosks which have been  
25 abandoned, and this lawsuit -- there is only vague

1 descriptions of what would happen with any of them. The  
2 BitLicense can't necessarily be transferred. The ATM  
3 kiosks, you get sort of different stories as to where they,  
4 what the purpose is, or what's going to happen with them at  
5 every turn. And on the litigation, to Mr. Sherman's  
6 counsel's point, there has been no litigation filed, there's  
7 been only delay, there is no value on collectability, and we  
8 have no idea that it would be enough to pay anyone other  
9 than -- again, to repay either Mr. Zampella, the attorneys'  
10 fees, or Mr. Langberg.

11 There's no there there. There's absolutely no  
12 reason for this case to be in Chapter 11.

13 There are other points, of course, made in our  
14 pleadings and we'd respectfully refer the Court to them.  
15 But for the sake of time and not repeating Mr. Sherman's  
16 counsel's arguments, at this point, I will leave it at that  
17 unless the Court has questions, of course.

18 THE COURT: Okay. Who else joined who wants to...

19 MR. BANZHAF: Your Honor, this is Alex Banzhaf for  
20 Robert Taylor. We filed a joinder. I will be brief.

21 The only point that I wanted to make was that  
22 Debtor's counsel represented that the matters were removed  
23 on the basis of derivative claims brought on behalf of the  
24 Debtor; that is not the case. In the claim that Mr. Taylor  
25 brought, he asserted derivative claims on behalf of a

1 separate entity, but not the Debtor entity. So in the event  
2 that this matter survives the pending motion, we will be  
3 seeking remand on that basis. Thank you.

4 THE COURT: Okay. I've got a question for any of  
5 you before I return to Mr. Horn. In evaluating a motion  
6 under 1112(b), the movant has the burden of demonstrating  
7 cause by a preponderance of the evidence, and I have wide  
8 discretion to determine whether cause exists. If I  
9 determine that cause is present, then I have a choice to  
10 make that the code specifically gives me, and that choice is  
11 to dismiss or to convert.

12 I did not see in any of your papers, but I might  
13 have missed it -- certainly I didn't see it in the main's  
14 motion -- any discussion of that alternative. You all want  
15 the thing to dismiss because you've got the state court  
16 litigation that can go on -- it can go on anyway, assuming I  
17 (indiscernible) and I don't keep the cases here.

18 But I guess I want to understand, one of the  
19 things that bankruptcy does do, it stops a race to the  
20 courthouse. And to the extent that there are assets here,  
21 maybe the machines but maybe not, the lawsuit against the  
22 party who created a security breach allegedly. What was the  
23 third alleged asset? I'm having a senior moment.

24 MR. HORN: The BitLicense.

25 THE COURT: The BitLicense, which again, is

1 something that may or may not have value or be  
2 transferrable; if it's not transferrable, it doesn't have  
3 value. But, you know, then again, I don't know if it was  
4 the Debtor's application or the principal or whatever;  
5 again, it sounds like it was very complicated, I know I'm  
6 going to hear.

7 But also potentially, and I think that this is one  
8 of the keys here, and Mr. Khodorovsky will speak to it in a  
9 different context probably, but folks are going after this  
10 principal of the company and it appears that there may be  
11 claims against the principal that the company might have and  
12 presumably could be prosecuted by a Chapter 7 trustee. And  
13 a Chapter 7 trustee, again, could certainly be fine with all  
14 of the litigation proceeding in state court and just  
15 basically, you know, monitor it or, you know, whatever.  
16 They don't have to spend a lot of money because, as I said,  
17 the Debtor would be the nominal party in the Chapter 7,  
18 there's nothing much to do.

19 So I guess I want to understand why it isn't a  
20 better alternative, assuming I decide that you have shown  
21 cause, to convert this case rather than to dismiss it so  
22 that, again, we don't have sort of a race to the courthouse  
23 to go after the principal when, in fact, the entity may have  
24 claims against the principal and we have a process here for  
25 anyone and everyone filing claims and, you know, getting a

1 distribution of assets.

2 So, I mean, again, this is a case that  
3 (indiscernible) may be a case that hasn't operated in a very  
4 long time, the company hasn't operated. And, often, Chapter  
5 7 is a neat way to deal with the burial and to examine into  
6 what may or may not have occurred within the last number of  
7 years.

8 So before I turn to Mr. Horn, I would like any of  
9 you, if you would -- Mr. Khodorovsky has his hand up, I may  
10 go to him next -- Mr. Khodorovsky and then the others as to  
11 whether or not assuming -- I'm not finding that you've met  
12 the burden of cause when I get to the next decision as to  
13 whether to dismiss or convert why. And again, sometimes a  
14 Chapter 7 trustee gets brought in to take a look.

15 I mean, obviously, this might have been a case for  
16 an 1104 trustee, but it's not. In other words, one could  
17 have argued that the Debtor's failure to bring the action,  
18 the Debtor's failure to collect the machines, that there may  
19 have been mismanagement. But again, this case doesn't have  
20 the money for an 1104 trustee.

21 In a Chapter 7 context, the trustee may look  
22 around and decide that whatever assets are here, it decides  
23 to abandon, but it's taken a look and then presumably, you  
24 know, it can go back to being a potential free for all.

25 Mr. Khodorovsky?

1 MR. KHODOROVSKY: Thank you, Your Honor. Again,  
2 Nazar Khodorovsky for the U.S. Trustee. Your Honor, I'll be  
3 very brief.

4 The UST no objection to the motion to dismiss  
5 these cases. However, Your Honor, as Your Honor correctly  
6 said, the U.S. Trustee would prefer conversion to dismissal  
7 of these cases if cause exists. From when my office  
8 investigated this matter, investigated in the eye of  
9 preparing the objection to Mr. Horn's retention, as Your  
10 Honor has stated, we know that there may be claims both  
11 against Mr. Zampella and also claims against one of his  
12 entities, an entity -- and I'm going to try to pronounce  
13 this name as best as I can, and Mr. Horn or (indiscernible)  
14 correct me -- Coindado LLC, which appears as receiving  
15 payment from the Debtor in 2021.

16 So, Your Honor, the U.S. Trustee does think that  
17 Mr. Zampella is conflicted and Mr. Langberg may also be  
18 conflicted potentially. So from the U.S. Trustee's  
19 perspective, if Your Honor does believe that cause exists  
20 under Section 1112, the U.S. Trustee will prefer conversion  
21 to dismissal. There are many claims that have been brought  
22 (indiscernible) on behalf of the estate and there might also  
23 be claims that exist against both Coindado and against Mr.  
24 Zampella that a neutral fiduciary would want to investigate.

25 Thank you, Your Honor.

1           THE COURT: And again, it seems to me as far as  
2 cost goes if this were to stay in an 11, where we come out  
3 with Mr. Horn's retention. Is he conflicted; does he not  
4 get to represent either? But even if I were to overrule  
5 your objection and he were to represent the Debtor, he  
6 certainly can't represent -- the attorney would need special  
7 counsel determinations as to whether he's going to proceed  
8 against the principal.

9           And again, what Mr. Horn's going to have to  
10 convince me of is that this is not a total charade because  
11 it looks like a charade. But again, it looks like a charade  
12 doesn't mean it is a charade, looks like a charade, and  
13 again, lots of things just don't ring true or legitimate or  
14 it makes sense. In other words, if these things were so  
15 valuable, you know, where have you been.

16           I mean, again, a principal has a fiduciary duty  
17 or, again, a principal -- I think that's right -- you know,  
18 a director or a stockholder, you know, when you're insolvent  
19 for the benefit of creditors. And it doesn't seem that the  
20 party who was running this entity did any of that to try to  
21 get its assets together for the benefit of its creditors.

22           So you've got potentially breach of fiduciary duty  
23 claims here; there's all kinds of claims here. And I'm just  
24 wondering, rather than all of you racing to different  
25 courthouses in some ways competing with a representative of

1 the estate with respect to, again, potential assets by the  
2 principal or the principal's other company, why a conversion  
3 doesn't make more sense than a dismissal, assuming I find  
4 that you have cause.

5 So we go to the movant first, and then I will go  
6 to Mr. Horn for his entire presentation.

7 MS. ROSSAN: Just on that discrete issue that you  
8 just raised, dismissal over conversion, we did address it at  
9 the end of our brief on Pages 15 and 16.

10 THE COURT: You said there are no assets to  
11 liquidate.

12 MS. ROSSAN: Right. And just to -- right, we did.  
13 There are no assets to liquidate and all of the creditors  
14 were litigating on their own behalf in state court and  
15 making progress. And we, Sherman, not only sued the Debtor,  
16 we sued Mr. Zampella individually, and we sued his related  
17 entity, Coindado, that Mr. Khodorovsky referred to because  
18 Mr. Zampella took all this money out of Cottonwood, the  
19 Debtor, and just funneled it to Coindado, which is an LLC  
20 based in Puerto Rico that he 100 percent owns.

21 THE COURT: But you make the point; that's why you  
22 make the point. The point is that a 7 or a bankruptcy where  
23 you've got everybody in the different litigations racing  
24 after the same thing to see who gets there first, it's made  
25 for this. It's not necessarily made for this to stay with



1 the Debtor or debtor-in-possession, but it kind of is made  
2 for this for purposes of a 7 trustee so we get around this  
3 race to the courthouse and all of these competing claims.

4 So I understand why each of you individually  
5 wouldn't necessarily want to be part of that party, but I  
6 have to look at it in a more global way.

7 MS. ROSSAN: Well, I didn't mean to make that  
8 point, and I'm sorry if I did. So maybe I'll just amend  
9 what I said and say that it would be unnecessarily -- it  
10 would cost money to have a Chapter 7 trustee, and I think  
11 the creditors would just be better off just litigating their  
12 claims as they were doing. They were -- they can represent  
13 their interests in state court. There are no assets for a  
14 Chapter 7 trustee.

15 THE COURT: Well, again, we don't know that.  
16 That's the Chapter 7 trustee's job to determine. I mean, it  
17 seems to me you've all conceded a potential asset, and that  
18 is if there was a transfer that was improper by the company  
19 to its principal or to its principal's related corporation,  
20 that's an asset that a trust -- that's an asset. And maybe  
21 this other stuff is assets and maybe it's not, but that's  
22 why you get a trustee in to take a look and see, a looksee  
23 to see whether it makes sense.

24 As far as it being expensive, unfortunately, it's  
25 not really expensive in the sense that trustees only get

1     paid to the extent that they create an estate, bring money  
2     into the estate, in which case they get (sound glitch). And  
3     to the extent that they retain counsel, that counsel for  
4     better or worse only gets paid, again, if there's an estate  
5     in which to pay them.

6             So, unfortunately, it really is, in the nature of  
7     a contingency fee situation, although that's not what we  
8     call it. But, in fact, if they can't collect -- and also,  
9     to the extent that we don't want to -- I mean, there's  
10    another thing that makes sense. To the extent that you're  
11    all chasing the principal here and the principal is going to  
12    have to, assuming I don't keep these cases, continue to  
13    litigation and spend a lot of money, why would you want him  
14    to do that so that at the end of the day, you know, he's got  
15    that much less money to pay your judgment, assuming you get  
16    a judgment.

17            So, I mean, there are a whole lot of reasons why  
18    it would be more economical for everybody to do this.  
19    Again, and nothing stops you from continuing your litigation  
20    against the others, assuming the litigation doesn't, you  
21    know, again, assuming it doesn't stay in my court or even if  
22    it does.

23            But I want to -- Miss Giugliano, your thoughts on  
24    conversion?

25            MS. GIUGLIANO: Thank you, Your Honor. Sheryl

1       Giugliano, counsel to Jason Penner.

2               So, of course, in the first instance, Mr. Penner  
3       was looking for the case to be dismissed, but I think the  
4       Court makes valid points with respect to the equity and what  
5       might be accomplished through a Chapter 7 trustee.

6               The one point I would make contrary to that is  
7       similar to the point that I made earlier in that the  
8       potential avoidance actions that are created by the estate.  
9       First of all, they continue to exist under state law, absent  
10      the bankruptcy filing, and they did exist before and that  
11      was probably part of the litigation that the parties are  
12      pursuing.

13              And so, I would say, again, it's a little circular  
14      to say, well, there is things to investigate here, but those  
15      things existed before, you know, Mr. Zampella decided to  
16      bring us all before Your Honor, which we're happy to be  
17      here, of course, but I think under other circumstances  
18      potentially.

19              Anyway, I think that at the end of the day, our  
20      client would be amenable to a conversion but would, in the  
21      first instance, prefer a dismissal.

22              THE COURT:   Okay.

23              MS. GIUGLIANO:   Thank you, Your Honor.

24              THE COURT:   Mr. Banzhaf.

25              MR. BANZHAF:   I would echo the comments we just

1 heard and say that we filed originally in the Supreme Court  
2 because that was our chosen venue. And like what Miss  
3 Rossan said, there were numerous -- there were rulings that  
4 inured to our client's benefit there and that is why we  
5 would prefer a dismissal over a conversion. But otherwise,  
6 I have nothing else to offer.

7 THE COURT: Well, again, assuming you were --  
8 again, assuming that the trustee was prepared to consent to  
9 matters being remanded, let's say, is that -- you state  
10 court litigation could continue. Again, I don't know what  
11 kind of discussions you would have with the trustee; I don't  
12 want to get ahead of myself, but I think that's going too  
13 far down the road. I don't think it would do that -- again,  
14 I think that it would -- one of the key things to do, again,  
15 7 for corporation's a way to bury an end of corporation in a  
16 neat way, and also in a situation like this where you may  
17 have self-dealing or avoidance actions.

18 I mean, you could have fraudulent conveyance  
19 actions. You presumably would have to, you know, amend your  
20 pleadings if you don't have them. Preference actions, they  
21 only exist in my forum; they don't exist in state court  
22 forums. Fraudulent conveyance actions do, but preference  
23 actions don't; they only exist in (sound drops), as part of  
24 the same idea that you don't want to race to the courthouse.  
25 And so, anything that's been done within 90 days could come

1 back or a year for (indiscernible).

2 Okay, Mr. Horn, your turn.

3 MR. HORN: All right.

4 THE COURT: You've got an uphill battle here.

5 MR. HORN: That's all right.

6 THE COURT: A lot of it is rooted in the same  
7 arguments that the U.S. Trustee is making in that this looks  
8 like a -- again, this looks, you know, that this Debtor  
9 could have, through this principal, could have a lot of  
10 these things a long time ago. All of a sudden, it wakes up  
11 that it thinks it's going to be able to do this and bring  
12 all the litigation in front of what you thought might have  
13 been a friendly forum.

14 MR. HORN: Judge, if I could just paint the  
15 picture, tell the story, have an opportunity.

16 THE COURT: Go ahead.

17 MR. HORN: All we've heard today, Your Honor, was  
18 testimony. Again, I'd like to remind everybody that this is  
19 not an evidentiary hearing.

20 THE COURT: Oh no, no, no. I didn't hear any  
21 testimony. I just heard argument. I don't take testimony  
22 by way of argument.

23 MR. HORN: Okay. Thank you, Your Honor. Your  
24 Honor, let me just give a little bit of a backdrop here, and  
25 again, I apologize for my colleagues who prepared very

1 diligently, you know, to have the ability to present on the  
2 law and on the facts, but it looks like I'm going to have to  
3 address just some of what was said.

4 Again, Your Honor, this case was filed in good  
5 faith. The reason that it was filed in good faith, Your  
6 Honor, there are various litigations. It wasn't a  
7 litigation tactic, Your Honor, because there's just -- all  
8 these things belong in one forum, Your Honor. Again, in  
9 order for creditors, cases are for the most part derivative  
10 in nature, okay. So because they're derivative in nature,  
11 they belong to the estate. It is up to the estate to  
12 prosecute them. And we could discuss whether or not, you  
13 know, Mr. Langberg is the appropriate fiduciary; we can get  
14 to that another time. But what I am saying, Your Honor,  
15 this was not a litigation tactic; this was filed in good  
16 faith.

17 And with regard to the value of the assets, again,  
18 I could address the kiosks first because everyone seems to  
19 be jumping up and down over these kiosks. Okay, the reason  
20 the kiosks were disclosed is because it's an asset of the  
21 estate. Whether it's recoverable is a different story.  
22 Just like the schedules ask for a/r, okay, and there's  
23 little things you fill in for a/r, whether it's 180 days,  
24 whether it's 30 to 90. This may not be recoverable, but  
25 that doesn't take away from the fact that it's still an

1       asset, and what has been disclosed is the assets from the  
2       kiosk. And again, I just want to paint the picture.

3               THE COURT: Well, paint the picture for me and  
4       tell me why the Debtor --

5               MR. HORN: Your Honor, but I want to --

6               THE COURT: -- (indiscernible) why when he decided  
7       to terminate the business did it abandon the kiosks?

8               MR. HORN: Okay, Your Honor, but again, let me  
9       just -- if I could just paint the picture and then we can go  
10      back to the kiosks at the end if appropriate with Your  
11      Honor.

12              The reason the kiosks were valued that way, Your  
13      Honor, is simple. The accountant for the Debtor said it's  
14      cost of the kiosks minus depreciation, so that's how a value  
15      was come up with. Again, we don't know if they're  
16      collectable. You know, we placed a few calls, but we  
17      haven't located any. And, quite frankly, I don't think  
18      we're going to focus on that asset because that asset --

19              THE COURT: Do you know what it costs, by the way,  
20      what does those kiosks cost? You had to buy -- you bought  
21      them new, right?

22              MR. HORN: I can get that information, Your Honor.  
23      I do not have that information.

24              THE COURT: You don't know what they cost, okay.

25              MR. HORN: I don't know how much they cost.

1 THE COURT: How long did the Debtor operate?

2 MR. HORN: It was, I believe, like, 2017 to 2021.

3 THE COURT: Okay, go ahead.

4 MR. HORN: Okay. So, Your Honor, that's the issue  
5 with the kiosks. The bigger asset pools here are (a) the  
6 BitLicense. I mean, everyone could say it's not  
7 transferrable, it's not this, it's not that; they don't  
8 know. Again, I have been talking to parties. I have been  
9 talking to Hilco, who is the gold standard in special asset  
10 classes. I have been talking to Maltz Auctions, who you  
11 know does just regular types of things, but not necessarily  
12 this type of particular asset class. I've been talking to  
13 other people. We're trying to get in touch with Moelis, who  
14 specializes in crypto type of sales.

15 THE COURT: I'm not suggesting you haven't worked  
16 very hard.

17 MR. HORN: But I want to --

18 THE COURT: So I'm not suggesting you haven't  
19 worked very hard. The problem is that your principal, okay,  
20 is a creditor.

21 MR. HORN: Understood, Your Honor.

22 THE COURT: Now, add to that, not just an ordinary  
23 creditor, but a creditor whose claim may be tainted, let's  
24 say. And so, therefore -- and again, it's a single member  
25 LLC, right, so it's not -- and so you say, okay, but you've



1 explained his obligations and his obligation is to act on  
2 behalf of a bigger good than himself, you know, the company,  
3 the corporation, the Debtor, he's a fiduciary.

4 But where is the evidence of him doing any of that  
5 for the last couple of years, okay? All of a sudden, he  
6 woke up one morning, the angels came -- I don't know -- and  
7 he said -- or a better angel came and he said, I now have  
8 to, you know, change my ways and correct what I haven't done  
9 for two years?

10 I mean, again, that's my problem. You want us to  
11 put all of our trust in you as the attorney for the Debtor,  
12 that's fine, but again, who do you take direction for. I  
13 don't want to put you in that ethical  
14 situation/problem/quagmire when, again, if you want to tell  
15 me how great your principal is.

16 MR. HORN: Your Honor, that's not my plan.

17 THE COURT: Again, I don't know how you do that  
18 when he basically just walked away and didn't worry an inch  
19 about any of these assets or commencing the lawsuits or  
20 didn't do anything on behalf of entity or creditors.

21 MR. HORN: Your Honor, if I could just, again,  
22 just paint the picture here, if anything, just for the sake  
23 of creating a record, so we have a whole --

24 THE COURT: Okay.

25 MR. HORN: Whether it requires an evidentiary

1       hearing or not, I mean, we could discuss that later if Your  
2       Honor feels it's necessary. But, Your Honor, again, whether  
3       my principal, you know, walks on water or whether he's the  
4       biggest crook in the world, I don't really care, okay?  
5       We've all dealt with, you know, these types of principals.  
6       I'm sure he's a lovely guy, you know, he seems like a nice  
7       guy, but it doesn't matter. It doesn't matter, we've all  
8       seen bad debtors.

9               We've all seen debtors who are far worse in this  
10       court. But it doesn't matter, Your Honor, because again, at  
11       the end of the day, we're all familiar with, you know, the  
12       fox guarding the henhouse and Cybergenics and all that  
13       lovely language that everyone likes to quote.

14              But here, we have a guy named Mr. Langberg, okay.  
15       I've known Mr. Langberg since 2006, okay. Mr. Langberg is a  
16       chief restructuring officer. He worked with -- when I was  
17       at Lowenstein, he was basically the chief restructuring  
18       officer of every single case I was involved in on a retail  
19       level. He's the --

20              THE COURT: Okay. So you brought him in to clean  
21       this up.

22              MR. HORN: That's exactly right, Your Honor, and  
23       this is the whole point. The whole point is Mr. Langberg is  
24       a fiduciary. We even amended the operating agreement, Your  
25       Honor, to make it crystal clear that anything that has the

1 word Aniello in it or Zampella, Mr. Langberg makes the  
2 decision, no ifs, ands, or buts about it.

3 THE COURT: But, Mr. Horn, assuming -- again, I  
4 don't know who's paying Mr. Langberg, but assuming -- I'm  
5 not questioning him and I'm not questioning you. I'm just  
6 questioning, we now have you to pay; we have Mr. Langberg to  
7 pay or whatever his name is; we have presumably a special  
8 counsel to pay, at least one, okay, in order to do various  
9 litigation that's going to be demanded be done.

10 So now we've got three professionals to pay, as  
11 opposed to a Chapter 7 trustee who gets paid only to the  
12 extent that he recovers and presumably one attorney who he  
13 would be -- and again, he is that. I mean, we don't have to  
14 bend ourselves back and forth like a pretzel to create  
15 somebody independent. You've done quite the job trying to  
16 do that and I'm not questioning you. I'm just saying we can  
17 have an independent, they sit on a panel, they're very good  
18 at what they do, and there is nothing to operate here.  
19 There's just cleanup.

20 MR. HORN: Understood, Your Honor.

21 THE COURT: Looking for (sound glitch) and  
22 determining whether they're worth pursuing. And if they're  
23 not worth pursuing, they will be -- either a creditor, you  
24 know, the other possibility is that to the extent there's an  
25 asset here, a creditor may want to buy that asset from this

1 case in order to pursue to pursue it; it's possible. I  
2 mean, I've seen that; that's been done before. You know,  
3 whatever interests the trustee may have could be purchased;  
4 that's a possibility.

5 And again, the other thing is we create that  
6 independence that you're trying so hard to create and it's  
7 going to take at least three professionals to create and  
8 then still there's a cloud.

9 MR. HORN: Your Honor, if I may just address all  
10 of these questions?

11 THE COURT: Yeah.

12 MR. HORN: Because again, it's really important --  
13 and I apologize for interrupting, it's not my intention at  
14 all -- but it is important that Your Honor have the benefit  
15 of the full picture here and the benefit of the full record.

16 So again, Your Honor, and I'll give you an example  
17 of how the process works and how it is working. So there is  
18 a loan, which was filed on a secured basis. There is a UCC  
19 that was filed, you know, it was filed on the day of -- I  
20 believe it was filed on the day of or the day before the  
21 filing of the UCC.

22 THE COURT: But doesn't that smell to high heaven?

23 MR. HORN: Your Honor, but --

24 THE COURT: Does that sound like a fiduciary who's  
25 acting on the best --

1 MR. HORN: Your Honor -- Nazar, you can laugh, but  
2 again, let me have the opportunity to speak without you  
3 making faces at me, okay?

4 So, guys, listen, here's the thing. So what I'm  
5 saying is that Mr. -- we have beat up on the principal,  
6 okay, that he has agreed to recharacterize that loan as an  
7 unsecured loan. And remember, Your Honor, any party could  
8 object to a proof of claim, any party, any party in interest  
9 in the case. So if we don't want to do it, Adam Sherman or  
10 Robert Taylor or Jason Penner or, you know, their wives or  
11 their dogs could object to it for all I care, okay?

12 This process works, okay? It demonstrates that  
13 Mr. Langberg is a fiduciary. Who he's being paid by it  
14 doesn't matter. Again, Your Honor, we have a \$250,000 gift  
15 that we're about to sign off with a third party, okay? I  
16 don't see the conflict there.

17 And again, I don't want to jump around, but this  
18 whole thing about reten- --

19 THE COURT: Why do we need to borrow? A trustee  
20 doesn't have to borrow \$250,000.

21 MR. HORN: Your Honor, but again, I'd like to have  
22 the opportunity just to tell the story. And if Your Honor  
23 wants to rule against us, that's fine, but I feel --

24 THE COURT: What is the story?

25 MR. HORN: So that's what I'm saying. Your Honor,

1 I'm trying to paint the picture here. I'm trying to tell  
2 you what has been done, because again, Chapter 11s are filed  
3 for a whole host of reasons, okay. You know, you've seen  
4 Chapter 11s file on the morning of a sale when the people  
5 are about to raise their hand in an auction. I mean, we've  
6 all seen that, okay?

7 THE COURT: Almost every one of my cases, go  
8 ahead.

9 MR. HORN: Right, because that's Brooklyn. I  
10 mean, that's the nature of the beast in Brooklyn, and I've  
11 filed plenty of those cases in front of Your Honor, so I  
12 understand.

13 But again, Your Honor, that doesn't detract from  
14 the fact that there are assets. There's a \$5 million claim.  
15 We have a special counsel about to be engaged who's going to  
16 work on a contingency basis. And again, I can leave it to  
17 my colleagues if they want to explain, you know, why it  
18 wasn't filed, why Mr. Zampella got bad advice from his last  
19 counsel. Again, you know, I could advise people of  
20 malpractice, but malpractice statutes have long run in this  
21 case. But again, that's not my business to deal with one  
22 way or another.

23 What I am saying is that the process with Mr.  
24 Langberg worked. They've now agreed to reduce to --  
25 recharacterize that claim as an unsecured claim, okay. So

1 that right there, early in this case we're demonstrating  
2 that the process works.

3 With regard to -- and I don't want to jump around,  
4 but with regard to Mr. Khodorovsky's objection, that's just  
5 nonsense, Your Honor. The whole thing is nonsense because  
6 he wants to file a motion to appoint the trustee or convert  
7 the case, he should do that, not some backwards way to  
8 attack, you know, my retention as somehow we're tainted,  
9 which is nonsense, okay.

10 And, Your Honor, I don't want to go into  
11 settlement conversations with me and Nazar, but it's clear  
12 as day that this is nothing more than a disguised motion to  
13 dismiss -- excuse me -- a motion to convert or a motion to  
14 appoint a trustee.

15 THE COURT: Well, I don't --

16 MR. HORN: He can bring it on. Your Honor, this  
17 has been going on since day one. I'm happy to address it.  
18 I'm happy to have an evidentiary hearing. I'm happy to  
19 depose every single party up here. I'm happy to depose the  
20 U.S. Trustee. I'm happy to do whatever I have to do to  
21 fight for my client.

22 But again, Your Honor, I keep on coming back to  
23 the issue here that every case has hair on it. Chapter 11s  
24 are expensive, okay. We've all seen -- I remember in a case  
25 early on in 2004, I was working on the Twinkie case when I

1 was at Lowenstein, and everyone was saying it's a par plus  
2 case, 110-cent case. After \$100 million in fees, creditors  
3 got 1 percent and still got sued on preferences. It's  
4 expensive; that's the nature of the beast. That's not my  
5 problem, that's Congress's problem, okay, Your Honor?

6 But again, here we are.

7 THE COURT: I'm here to take that problem away if  
8 I can --

9 MR. HORN: But, Your Honor, that issue is not  
10 before you today, Your Honor.

11 THE COURT: No, it is, it's very much before me.  
12 Every time (crosstalk) --

13 MR. HORN: Dismissal isn't.

14 THE COURT: I can convert, of course it is. You  
15 don't know your law then.

16 MR. HORN: Then I apologize. Then, Your Honor, we  
17 would request an evidentiary hearing.

18 THE COURT: I don't need an evidentiary hearing.  
19 Why do I need an evidentiary hearing?

20 MR. HORN: Because you're taking away the Debtor's  
21 rights.

22 THE COURT: I don't need an evidentiary hearing.  
23 The question is whether (indiscernible) by a preponderance  
24 of the evidence if demonstrated under 1112(b), a basis.  
25 There's not an argument over the theft. There's no issues



1 of theft here. The facts are the facts. You're conceding  
2 what happened as well. The facts are the facts. No one's  
3 arguing -- I don't think there's been any significant  
4 material factual dispute here. I don't need an evidentiary  
5 hearing.

6 MR. HORN: Well, Your Honor, again --

7 THE COURT: I need to determine whether 1112  
8 applies. Now you had a co-counsel or somebody in your  
9 office who wanted an opportunity. I want to give her that  
10 opportunity. She's probably prepared a lot.

11 MR. HORN: Go ahead, guys.

12 THE COURT: Just say your name first before you  
13 speak.

14 MR. MANSFIELD: Hi, Your Honor. James Mansfield  
15 with A.Y. Strauss on behalf of the Debtor, Cottonwood  
16 Vending, LLC. (Indiscernible) my office, so Miss Harper  
17 used her office (indiscernible).

18 But to start, the movants have a burden to prove  
19 that there will be serious diminution of the estate and that  
20 there's no reasonable likelihood of rehabilitation. What we  
21 have indicated is that we (indiscernible). The case law is  
22 clear that plans of liquidation are means of rehabilitation;  
23 that is clear from the law. The Supreme Court has held that  
24 (indiscernible) plans of liquidation.

25 So the creditors and the movants arguments that we

1 haven't shown that we can reestablish an operating business  
2 that will emerge from Chapter 11 is irrelevant; we have a  
3 plan of liquidation. So our assets here, as Mr. Horn has  
4 testified -- has represented the BitLicense. Now, the  
5 creditors have said -- movants have said that, you know,  
6 they don't know if we can transfer those or what have you,  
7 but they don't know, as Mr. Horn (indiscernible) on the  
8 record, (indiscernible) about transferring the  
9 (indiscernible) transferring the BitLicense.

10 We have the litigation of Digital Ocean. Now, Mr.  
11 Sherman's counsel has represented that, you know, why hasn't  
12 anyone filed it. I mean, for one, we have already met the  
13 -- we're in the process of obtaining counsel on contingency  
14 fee basis, special counsel.

15 THE COURT: Well, what about all these years that  
16 have passed? I mean, I guess that's the point. And if, in  
17 fact, there was malpractice and that statute of limitations  
18 has expired, you would have yet a very additional,  
19 significant failing by the principal, by the Debtor through  
20 its principal. Again, that would have been a valuable asset  
21 if it was malpractice. And if the statute has run on that,  
22 then again, that's another example of an asset that doesn't  
23 exist anymore by virtue of total inaction by the fiduciary,  
24 right?

25 MR. MANSFIELD: Well, for one, we're still within

1 the statute of limitations to prosecute the Digital Ocean  
2 claim, which I think is where most of the value is, it's a  
3 \$5 million claim. What Mr. Zampella did on behalf of the  
4 Debtor prosecuting the malpractice claim, I can't talk to.

5 THE COURT: But why didn't he prosecute this  
6 claim?

7 MR. HORN: Your Honor, could I just interrupt real  
8 quick? I'm sorry. And again, I just want to make sure that  
9 we're all talking about the same things and I apologize, Mr.  
10 Mansfield.

11 Again, the whole point is the lawyer who they've  
12 been talking to wanted millions of dollars to file a suit,  
13 okay, and my understanding is at that point, it didn't make  
14 much sense to do it, okay. There are some more issues and I  
15 can get into that, but again, the long and the short of it  
16 is that Mr. Zampella did aggressively look to find a lawyer  
17 to pursue that action, although it was too expensive and he  
18 got bad advice.

19 THE COURT: Mr. Horn, when did you first get  
20 involved in this case?

21 MR. HORN: I got involved in this case probably  
22 about a month before filing.

23 THE COURT: And where are you getting all your  
24 information?

25 MR. HORN: Where am I getting my information?

1 Good question. I'm getting my information from: (a) the  
2 principal of the Debtor, Mr. Zampella; (b) from his  
3 accountants, he has two accountants working for him and the  
4 company; (c) --

5 THE COURT: I thought somebody died, somebody  
6 died?

7 MR. HORN: Your Honor, there's been replacement  
8 accountants. When someone dies, you have to get a new  
9 professional. Two accountants, and again, one of the  
10 accountants has noted some of the mistakes that have to be  
11 cleaned up; that addresses the final tax return; (b) from  
12 their prepetition counsel, who's been heavily involved in  
13 these litigations.

14 So it's not a whole -- it's not just me pulling  
15 facts out of the air, Your Honor. It's me --

16 THE COURT: No, I didn't think you were, but I  
17 think you're primarily getting them from your principal or  
18 the principal of the Debtor. And again, it's hard to -- I  
19 can understand why you'd be on the defensive when you ask  
20 questions, like, well, what's happened all these years, why  
21 did you abandon kiosks, so why did you not commence an  
22 action. You know, anybody -- you can commence an action as  
23 a pro se, anybody can commence an action. I mean, there's a  
24 lot here that doesn't make sense and the timing --

25 MR. HORN: Your Honor, he put in --

1 THE COURT: -- seems very suspicious. Again, Mr.  
2 Zampella's being sued from all sides in state court and you  
3 or some other professional offers him a total -- you know, a  
4 way out; we're here all in one place, you know. And there  
5 are assets and, well, you know, they'll file claims and  
6 we'll object to claims and we'll estimate claims and all of  
7 a sudden, you know, all of this litigation will be behind  
8 you. I get it. I get why --

9 MR. HORN: Your Honor, but again, that's not how  
10 I've approached this, Your Honor. I would never approach --

11 THE COURT: I know. Yeah, it sounds like your  
12 principal is doing this --

13 MR. HORN: I make no promises like that.

14 THE COURT: -- in order to preserve assets for the  
15 benefit of creditors. Where's he been for all these years?

16 MS. ROSSAN: Your Honor, may I just interject one  
17 thing? In Sherman's state court action, we got valuation  
18 experts. I annexed, you know, an excerpt from -- so the  
19 Debtor had an expert valuing -- hired expert to, you know,  
20 do a valuation of what the Debtor was worth.

21 And I can just tell you that they said -- their  
22 expert said, okay, the ATMs are written off, they're of no  
23 value. The company is not a going concern as of October  
24 2021. And there was nothing in that expert report about any  
25 value to a claim against Digital Ocean. Like, those

1 experts, those valuation experts -- I'm sure Mr. Zampella  
2 told them about his purport- -- they mentioned a hack  
3 because they said, well, the company is not a going concern  
4 because it closed down because Mr. Zampella said there was a  
5 hack.

6 But in their valuation of the Debtor, they never  
7 took into account or paid any attention to this so-called  
8 claim against Digital Ocean, probably because it doesn't  
9 exist, it's never been filed.

10 MR. HORN: That's not true; that's simply not  
11 true.

12 MS. ROSSAN: And what is the benefit --

13 MR. HORN: And again --

14 MS. ROSSAN: -- (crosstalk). Please don't  
15 interrupt me, Mr. Horn.

16 MR. HORN: Guys, guys, guys, guys, with all do  
17 respect, it is my turn to speak. It is my turn.

18 MS. ROSSAN: I raised my hand and you were  
19 (indiscernible).

20 MR. HORN: It doesn't matter. Listen, I gave you  
21 the courtesy and didn't object to your whole rampage of  
22 thought, so give me the courtesy. Don't object to -- don't  
23 interrupt me, okay, it's just a professional courtesy.

24 So here we are again, we're back here again, Your  
25 Honor. We're about to -- we've been trying to negotiate

1 with Digital Ocean, we tried to have settlement  
2 negotiations, and we're about to file a complaint, we're  
3 about to get a special counsel employed who was employed  
4 prepetition. We have all these things, Your Honor, that  
5 we've been moving for the benefit of the estate and we've  
6 been moving diligently, Your Honor.

7 It's not like we've been sitting down on the  
8 sidelines saying, oh, Mr. Zampella, you got a jail out of  
9 free card because he doesn't; he doesn't have a get out of  
10 jail free card and he knows that. He knows that bankruptcy  
11 court is just a way to basically liquidate all of these  
12 options, all of these actions and for the benefit of all.  
13 We understand that, okay, he's been well advised of that. I  
14 make no promises to anybody, okay?

15 But again, Your Honor, I know you said it's an  
16 uphill battle, but I do have to reiterate, Your Honor, we  
17 have taken the utmost care to claim any conflicts, okay.  
18 We've worked forwards, backwards, sideways to make sure that  
19 the right person was put in, the person with impeccable  
20 character who just can't be bought; it's as simple as that.  
21 Mr. Langberg has been independent counsel for me,  
22 independent director in the MyCell case in front of Judge  
23 Garrity, he's been involved for the Big M, he's been  
24 involved in tons of bankruptcy.

25 THE COURT: I get it. Nobody was impugning

1 anybody's character. I get it.

2 Mr. Khodorovsky --

3 MS. HARPER: Your Honor, if I may?

4 THE COURT: I'm sorry, who wanted to --

5 MS. HARPER: Maria Harper.

6 THE COURT: Yes, go ahead.

7 MS. HARPER: Your Honor, Maria Harper, proposed  
8 counsel for Debtor and debtor-in-possession.

9 Here, Your Honor, we're like to just insist that  
10 we are in the infancy of this case. And as case law sets  
11 forth, the main inquiry is whether there was no opportunity  
12 -- no realistic prospect of rehabilitation once the case was  
13 filed, and that's simply not the case. We're, you know,  
14 being very diligent and speaking, you know -- looking for  
15 all of the options to liquidate any potential  
16 actions/assets.

17 The Digital Ocean lawsuit alone, it's our  
18 understanding is valued at \$5.7 million. We are in the  
19 process of engaging Kaiser Saurborn & Mair, and we would  
20 like the opportunity to file a retention application so that  
21 they could pursue these claims on a contingency basis.

22 The Debtor should be at least given the  
23 opportunity --

24 THE COURT: Is there any reason why they wouldn't  
25 work for the trustee on a contingency basis?



1 MS. HARPER: I can't speak to that, Your Honor.  
2 And with respect to the BitLicense, it's our understanding  
3 that approximately 25 licenses have been issued and that  
4 doesn't speak just to the difficulty of getting them, but  
5 more so to the fact that they are a valuable commodity in  
6 order to --

7 THE COURT: Do you know whether they're  
8 transferrable or not under the statute?

9 MS. HARPER: We are working to determine whether  
10 we can transfer it. But if it is, the fact that --

11 MR. HORN: Guys, hold on a second. Guys, hold on.  
12 We've been advised -- we understand that they are  
13 transferrable. The only thing is the end user -- we'd have  
14 to sell the company, okay, with the license; similar to an  
15 alcohol license, you have to sell the whole company and the  
16 end user would have to be approved. So they could hold the  
17 license --

18 THE COURT: That's another way of saying they're  
19 not transferrable.

20 MR. HORN: But, Your Honor, it's an asset that  
21 could be transferred. It's just a matter of --

22 THE COURT: Yes, and (indiscernible).

23 MR. HORN: -- financing (indiscernible).

24 THE COURT: Okay, and that's with a trustee. I  
25 don't want to cut anyone off. I'm running very late on my

1 calendar. I already saw I'm moving people that are leaving  
2 in further cases ahead of me. Anybody else want to say  
3 anything?

4 MS. GIUGLIANO: Your Honor, it's Sheryl Giugliano,  
5 Ruskin Moscou Faltischek, attorneys for Jason Penner.

6 I just want to point out that there's been no  
7 indication about all of these things they've been working on  
8 doing. Nothing has been filed. We're not at the infancy of  
9 the case. It's November; it was filed in August. Nothing  
10 has been filed. Nothing has been accomplished. It's a lot  
11 of I'm going to do this, I want to do this.

12 MR. HORN: That's right.

13 MS. GIUGLIANO: And, Your Honor, the last thing I  
14 would -- Mr. Horn, I'm sorry, I'm not sure to say that on  
15 mute, but you're interrupting what I'm saying, so I  
16 appreciate that you're frustrated.

17 MR. HORN: (Indiscernible), that's all I'm saying.

18 MS. GIUGLIANO: Seem unprofessional that you're  
19 showing to me that you just accused Mr. (indiscernible), but  
20 I don't appreciate it.

21 I'm sorry, Your Honor.

22 The last argument I wanted to make was with  
23 respect to the \$250,000 DIP loan that's being pursued. I'm  
24 not sure if it's on a secured or unsecured basis, but I'm  
25 not sure what assets the Debtor intends to attach them to or

1     what the purpose or need for it. So there's been a lot of  
2     talk about things that are going to happen, but there's been  
3     no statement that I've heard today that explains why this  
4     Debtor needs to be in a Chapter 11 case, not one.

5             That's all. I'll leave it at that, Your Honor.  
6     Thank you very much for the opportunity.

7             THE COURT: Mr. Horn, with respect to assets or  
8     anybody in your shop, did the Debtor have business insurance  
9     that would have covered that loss of -- the losses he had  
10    from the hack?

11            MR. HORN: I don't believe so, Your Honor. I  
12    don't believe that type of insurance was covered. And  
13    again, I think -- I can get more detail on that, Your Honor,  
14    but I do not think so.

15            THE COURT: All right. Folks, I don't do this  
16    lightly, and again, I'm sure that you have done a lot here,  
17    Mr. Horn, and I would expect that you may not be able to  
18    file a claim.

19            What I'm going to do here is I find that cause  
20    exists, but let me read you 1112. 1112(e) of the bankruptcy  
21    code states that a Court must first determine whether cause  
22    exists to dismiss or convert. (Indiscernible) in Paragraph  
23    2 in subsection (c) on the request of the party-in-interest  
24    and hearing the Court shall convert a case under this  
25    chapter to a case under Chapter 7 or dismiss a case under

1       this chapter, whichever is in the best interest of creditors  
2       and the estate for cause unless the Court determines that  
3       the appointment under 1104(a) the trustee or examiner is in  
4       the best interest of creditors and the estate.

5               Section 1112(b)(4) lists 16 examples of causes.  
6       The examples are non-exclusive. In re 1031 Tax Group, LLC,  
7       374 B.R. 7893 (Bankr. N.D.N.Y. 2007). See also In re  
8       (indiscernible) Associate, LP, 348 B.R. 627 and 639 (Bankr.  
9       N.D.N.Y. 2006), noting that Section 1112(b) contains  
10      (indiscernible) to be considered in determining whether  
11      causes exists to convert or dismiss a case. The bankruptcy  
12      court has wide discretion to determine if cause exists and  
13      how to ultimately adjudicate the case.

14             In evaluating a motion made under 1112(b), the  
15      movant has the burden of demonstrating cause by a  
16      preponderance of the evidence. In re Gel, LLC, 495 B.R. 240  
17      at 245 (Bankr. E.D.N.Y. 2012) citing Taub v. Taub, In re  
18      Taub, 427 B.R. 208 at 231, (Bankr. E.D.N.Y. 2010). A  
19      bankruptcy court has wide discretion to determine whether  
20      cause exists, and if cause is present, to decide whether to  
21      convert the case to one under Chapter 7 or to dismiss. Id,  
22      citing In re BHS&B Holdings, LLC., 439 B.R. 342 at 346  
23      (Bankr. S.D.N.Y. 2010).

24             Once the Court has found there's cause under  
25      1112(b), it must then decide whether conversion or dismiss

1 is in the best interest of creditors of the estate. In re  
2 FRGR Managing Member, LLC, 419 B.R. 576 at 580-81 (Bankr.  
3 S.D.N.Y. 2009). (Indiscernible) include whether a Chapter 7  
4 trustee is able to liquidate to assets to the benefit of  
5 creditors and whether conversion or dismissal would maximize  
6 the debtor's enterprise value.

7 With respect to bad faith, courts in this circuit  
8 determine bad faith based upon a totality of circumstances.  
9 It's a highly factual determination, but again, the facts  
10 here are not in dispute and I'm prepared to take Mr. Horn's  
11 view of the facts.

12 And again, even in the best light of the facts, we  
13 have here, again, a non-operating company. We have no  
14 employees presumably, putting aside this independent person  
15 who has just been brought on. We have no insurable assets,  
16 meaning that no assets. The only assets that we have here  
17 are assets that can be managed by anybody. And, in fact,  
18 because the principal -- again, in a perfect world if there  
19 was money here in this case, this would be a case where one  
20 would strongly consider this court.

21 I would strongly consider the appointment of 1104  
22 trustee because of what I view as gross mismanagement of  
23 this entity leading up to this filing, these years not doing  
24 anything to commence the lawsuit, other than hearing it was  
25 too expensive, abandoning kiosks, walking away from this

1 business, having some -- again, having a loan and then  
2 trying to secure it with financing or on the day of the  
3 filing even though everything that looks bad, you're going  
4 to back that up. Yeah, lots of it looks bad.

5 I know that you've -- it really looks bad, Mr.  
6 Horn, and you recognized it and you've been trying to  
7 cleanse it. You've been trying to make it better. You've  
8 been trying to make a showing that this is all going to be  
9 able to be okay; the case has been around for two or three  
10 months. Creditors don't want this, you know, 11, okay.  
11 They don't really want any 7 either, but that's because they  
12 all want to be the first in line to get a judgment.

13 And again, there's nothing here to reorganize, and  
14 to liquidate the kinds of things, again, that you need to  
15 liquidate, there's no going concern value here. We don't  
16 have an asset that we have to keep in an 11 for -- you know,  
17 again, and any asset that would have going concern value.  
18 To the extent that we got the license, the fact that I  
19 convert it, I mean, that also is an issue that you have to  
20 have a license that's in good standing and you don't want to  
21 convert a case because that could be a reason, but we don't  
22 have that here. We have to resurrect that license.  
23 Converting it is not going to change that.

24 So there's no reason here -- and again, the cost  
25 of keeping it in an 11 will far exceed the cost of

1 administration in the 7. In order to continue to claim this  
2 and there's always going to be a case by virtue of the fact  
3 that the principal, one principal here, that it's just very,  
4 very, very expensive and I don't know that you're ever going  
5 to get there.

6 It's important that even if there is no  
7 impropriety that there not be an appearance of impropriety  
8 in a Chapter 11 case, and I don't know that we ever can get  
9 past that, nor should we. We've got conflict of interest  
10 here. Even if you're not conflicted because, again, you,  
11 Mr. Horn, can sit above all of that, and I'm not questioning  
12 you on that. Their principal has conflicts of interest here  
13 and, you know, the question about whether or not the actions  
14 were pursued against him.

15 Again, the best place for that to happen is in a  
16 Chapter 7, and to the extent that we have preferences here  
17 or fraudulent conveyances, that's something that a Chapter 7  
18 trustee would look into. And maybe these assets are  
19 saleable, maybe somebody wants to buy them on this Zoom call  
20 from the trustees, or maybe there'll be a fund created for  
21 the trustee to pursue it and could put it all in one place.  
22 There are a lot of possibilities here. Or maybe the trustee  
23 will abandon them, abandon them to the Debtor or abandon  
24 them to a creditor.

25 So I believe, again, that there's cause, that

1       there's nothing here to reorganize. There are no assets  
2       here that depend upon an 11 to retain their value. They all  
3       can be liquidated and some that otherwise might not be  
4       pursued could be pursued by a Chapter 7 trustee.

5               MR. HORN: Your Honor, (sound glitch) my firm?

6               THE COURT: No, no, don't interrupt me. There are  
7       a lot of questions as to why this principal, who had a  
8       fiduciary obligation once the company was insolvent to ask  
9       for the benefit of creditors, okay, didn't do any of that;  
10      in fact, walked away from what might have had value then  
11      that may not have value anymore.

12              So there's been enough of a showing, based upon  
13      the totality of the circumstances here -- again, I know it's  
14      not a two asset case like you get in a single asset real  
15      estate case where you have two creditors, a single creditor  
16      case. There are competing creditors here, but again,  
17      because one of the things bankruptcy is supposed to do is  
18      stop a race to the courthouse, I believe that it should stay  
19      in bankruptcy.

20              So I believe conversion is appropriate here  
21      because there may be assets to administer and a trustee can  
22      bring avoidance actions against Zampella and liquidate any  
23      assets, and the same experts that the Chapter 11 debtor can  
24      employ, the trustee could employ. So the motion to dismiss,  
25      there's cause to dismiss, but I'm converting the case.



1           The other question, I guess no one has raised, but  
2 weren't there -- in the papers, didn't you indicate that  
3 there's some issues as to whether or not others have  
4 membership rights or ownership rights in this Debtor.  
5 Again, I don't --

6           MR. HORN: (Sound glitch) litigation, Your Honor.

7           THE COURT: Again, exactly. Maybe -- no one's  
8 challenged eligibility here. I don't know what the  
9 percentages are, but exactly. There are fights among all of  
10 the creditors as to everyone getting to the courthouse first  
11 and who would get what and who owns the membership interest  
12 and who doesn't, questions of potentially subordination.  
13 All of that is something that a Chapter 7 trustee can do.

14           So the case is converted. Mr. Khodorovsky, I  
15 would ask you immediately to get on this as far as getting a  
16 trustee appointed, and everything else is marked off as  
17 moot.

18           MR. HORN: Your Honor, well again, now the Debtor  
19 doesn't have representation. So even though it's a Chapter  
20 7, the Debtor still needs representation.

21           THE COURT: Yeah, because I don't know if there's  
22 -- again, first of all, Mr. Khodorovsky doesn't weigh in on  
23 Chapter 7 representation and there's not a lot that a  
24 Chapter 7 attorney has to do. So whether you --

25           MR. HORN: I'd also like to file a final fee app.

1 THE COURT: Well, again, it's not a final -- you  
2 can file a fee application in the 7.

3 MR. HORN: I'm not even retained, Your Honor.

4 THE COURT: Well --

5 MR. KHODOROVSKY: Your Honor, may I address that?

6 THE COURT: Yes, Mr. Khodorovsky.

7 MR. KHODOROVSKY: Thank you, Your Honor. Nazar  
8 Khodorovsky for the U.S. Trustee. Here's what I would like  
9 to suggest, Your Honor, regarding Mr. Horn's motion. I  
10 think actually Mr. Horn is making a very good point and I  
11 agree with him, so I would like to address scheduling on  
12 that issue if Your Honor would permit.

13 THE COURT: Okay, go ahead.

14 MR. KHODOROVSKY: Thank you, Your Honor, and I  
15 apologize for taking the time. I know it is late.

16 Your Honor, Mr. Horn is making a good point. Now  
17 that this case is converted to Chapter 7, in order for Mr.  
18 Horn to have a claim under Section 330, which I think that's  
19 what he's referring to -- Mr. Horn, you can correct me if  
20 I'm mistaken -- he would need to be retained so he can file  
21 a fee application. I think Mr. Horn is making a very valid  
22 point.

23 So what I would respectfully suggest, Your Honor,  
24 is that the issue of Mr. Horn's retention as Chapter 11  
25 counsel from the commencement of the case to the date of

1 conversion be adjourned to a further date so that a Chapter  
2 7 trustee could review the arguments made by Mr. Horn and  
3 received by my office and maybe even weigh in on the issue.  
4 I think there's a new potential to (indiscernible) here, who  
5 should weigh in on the allegations that this office has made  
6 against Mr. Horn and on Mr. Horn's dissent.

7 So I do think Mr. Horn should be given the chance  
8 to track with a new fiduciary and see if he's eligible to  
9 potentially file a claim under Section 330. I think he's  
10 making a valid point.

11 Your Honor, I would respectfully request if Your  
12 Honor would permit, there's already a date in this case for  
13 the 9th of January at 10:30, which is the pretrial date in  
14 the removed adversary proceeding, if possible, if just the  
15 retention application of Mr. Horn could be adjourned to that  
16 date. By that date a Chapter 7 trustee would be in place  
17 and that person, she or he or they, will be able to weigh in  
18 on Mr. Horn's retention and be able to have a discussion  
19 with Mr. Horn with my office and the retention.

20 THE COURT: Okay, that's fine with me. January  
21 9th at --

22 CLERK: If this case is now a 7, that current date  
23 is an 11 hearing date.

24 MR. KHODOROVSKY: Oh, I apologize then, Your  
25 Honor. I was not aware.

1           CLERK: So unless you want to leave it there or we  
2           can move that pretrial to a non-11 date, but it's up to you,  
3           Judge, if you want to keep it there for the time being at  
4           least for that first hearing.

5           MR. KHODOROVSKY: Your Honor, may I be just  
6           briefly heard on scheduling? And Mr. Horn, if you'll give  
7           me one second. I do think January 9th, at least would work  
8           best for the U.S. Trustee because that way we can ensure  
9           someone from my office to it.

10          THE COURT: January 9th -- we'll do it on Zoom  
11          even though it'll be a 7 by then -- at what time?

12          CLERK: I've got 10:30, Judge. Who will be  
13          submitting the conversion order, Judge?

14          THE COURT: It would be somebody who's making the  
15          motion to dismiss, Miss Rossan. Miss Rossan, circulate it  
16          first to Mr. Khodorovsky and to Mr. Horn and to the others.

17          MS. ROSSAN: Okay.

18          THE COURT: Circulate it all around, unless, Mr.  
19          Khodorovsky, you want to do it.

20          MR. KHODOROVSKY: Your Honor, I'm fine with the  
21          process Your Honor has suggested. I appreciate it, thank  
22          you.

23          THE COURT: I appreciate all of the good work, the  
24          briefing and all of that. I don't get enough of that. I  
25          appreciate it and enjoyed reading it and thank you all.

1       You've all worked very hard, including particularly, Mr.  
2       Horn, but I appreciate it. Thank you.

3               MR. HORN: Thank you to my team for putting in the  
4       good work in preparing it.

5               THE COURT: Thank you, team.

6               MS. HARPER: Thank you, Your Honor.

7               MR. KHODOROVSKY: Thank you, Your Honor.

8               (Whereupon these proceedings were concluded at  
9       11:59 PM)

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C E R T I F I C A T I O N

I, Rita Weltsch, certified that the foregoing  
transcript is a true and accurate record of the proceedings.



Rita Weltsch

Veritext Legal Solutions

330 Old Country Road

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Date: December 8, 2023

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